

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JAMES STEWART, SUE PEARCE, JOSEPH VIZZARD, WILIE JONES, TOLAN FURUSHO, and KEITH ROBERTSON, derivatively on behalf of Goldtech Mining Corporation, a Nevada Corporation

Plaintiffs,

vs.

TRACY KROEKER, RALPH JORDAN, JACK
LASKIN, NANCY EGAN RICHARD SMITH,
and SERGE BOURGOIN.

Defendants.

Case No. CV04-2130L

ORDER GRANTING IN PART
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

This matter comes before the Court on “Tracy Kroeker, Jack Laskin, Ralph Jordan and Nancy Egan’s Motion for Summary Judgment.” Dkt. # 78. Summary judgment is appropriate when, viewing the facts in the light most favorable to the nonmoving party, there is no genuine issue of material fact which would preclude the entry of judgment as a matter of law. The party seeking summary dismissal of the case “bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,’ which it believes demonstrate the absence of a genuine issue of material fact.” Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)). Once the moving

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1 party has satisfied its burden, it is entitled to summary judgment if the non-moving party fails to
 2 designate “specific facts showing that there is a genuine issue for trial.” Celotex Corp., 477 U.S.
 3 at 324. “The mere existence of a scintilla of evidence in support of the non-moving party’s
 4 position is not sufficient,” however, and factual disputes whose resolution would not affect the
 5 outcome of the suit are irrelevant to the consideration of a motion for summary judgment. Arpin
 6 v. Santa Clara Valley Transp. Agency, 261 F.3d 912, 919 (9th Cir. 2001); Anderson v. Liberty
 7 Lobby, Inc., 477 U.S. 242, 248 (1986). In other words, “summary judgment should be granted
 8 where the nonmoving party fails to offer evidence from which a reasonable jury could return a
 9 verdict in its favor.” Triton Energy Corp. v. Square D Co., 68 F.3d 1216, 1221 (9th Cir. 1995).

10 Taking the evidence presented in the light most favorable to plaintiffs, the Court
 11 finds as follows:

12 (1) In their Verified Stockholders’ Derivative Complaint, plaintiffs asserted three
 13 causes of action against the moving defendants: breach of duty of care, breach of duty of loyalty,
 14 and conversion. Those claims are restated in the First Amended Verified Stockholders’
 15 Derivative Complaint filed on September 9, 2005, and defendants Kroeker, Jordan, Egan, and
 16 Laskin seek summary judgment on all three claims. All parties agree that Nevada law governs
 17 this case.

18 Plaintiffs allege that the moving defendants breached their duty of care by issuing
 19 company stock under Securities and Exchange Commission (“SEC”) Form S-8 for unlawful
 20 purposes, by failing to take remedial actions when plaintiff Tolan Furusho raised concerns
 21 regarding the S-8 stock issuance, and/or by failing to know the affairs of the corporation.
 22 Opposition at 12-14. Plaintiffs also allege that the moving defendants breached their duty of
 23 loyalty and converted company property by creating a kick-back scheme whereby the
 24 beneficiaries of the S-8 stock transfers conveyed the stock certificates to defendants and/or their
 25 agents. Because this action was commenced on October 14, 2004, plaintiffs are required to
 26 show not only that defendants’ actions or omissions constituted a breach of their fiduciary
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1 duties, but also that the “breach of those duties involved intentional misconduct, fraud or a
 2 knowing violation of law.” NRS § 78.138(7).¹

3 (2) Defendants have presented evidence tending to show that S2 Consultants, one
 4 of the recipients of the S-8 shares at issue, entered into a consulting agreement with Goldtech
 5 Mining Corporation and provided valuable services in consideration for the restricted stock it
 6 received in May 2004. See Decl. of Ryan Shaver (Dkt. # 85). Plaintiffs do not present any
 7 evidence to rebut or refute defendants’ showing, instead arguing that because defendants
 8 Kroeker and Jordan have not responded to plaintiff Furusho’s requests for information regarding
 9 the S2 agreement, plaintiffs are “unable to establish that any work by S2 was performed to
 10 justify the issuance of 200,000 shares of Goldtech common stock” Opposition at 10.
 11 Discovery regarding these claims closed in July 2005. If defendants were not forthcoming in
 12 discovery, plaintiffs should have filed a timely motion to compel. At this point in the litigation,
 13 plaintiffs may not rely on the mere possibility that evidence supporting their claim may exist
 14 and/or may be discovered in the future: their burden is to come forward with admissible
 15 evidence showing that there is a genuine issue of fact to be determined at trial. Plaintiffs have

17 ¹ NRS 78.138(7) states in its entirety:

18 Except as otherwise provided in NRS 35.230, 90.660, 91.250, 454.200, 454.270, 668.045
 19 and 694A.030, or unless the articles of incorporation or an amendment thereto, in each
 20 case filed on or after October 1, 2003, provide for greater individual liability, a director or
 21 officer is not individually liable to the corporation or its stockholders or creditors for any
 22 damages as a result of any act or failure to act in his capacity as a director or officer unless
 23 it is proven that:

24 (a) His act or failure to act constituted a breach of his fiduciary duties as a director or
 25 officer; and
 26 (b) His breach of those duties involved intentional misconduct, fraud or a knowing
 27 violation of law.

28 Plaintiffs have not argued that the company’s articles of incorporation or any of the identified statutes
 expand the scope of an officer or director’s liability beyond that provided in NRS 78.138(7).

1 not done so with regards to the shares issued to S2 Consultants.

2 (3) With regards to plaintiffs' claims against defendant Tracy Kroeker, the
 3 testimony of the parties regarding who initiated the issuance of the S-8 shares cannot be
 4 reconciled: Furusho has stated that “[i]t was Ms. Kroeker who requested that S-8 stock be issued
 5 to consultants, including Richard Smith,” while Kroeker’s testimony suggests that her only
 6 involvement in the issuance was to sign documents at Furusho’s request. Decl. of Tolan
 7 Furusho at ¶ 11 (Dkt. # 96); Decl. of Tracy Kroeker at ¶ 8 (Dkt. # 80). Plaintiffs have provided
 8 the declaration of Furusho to show that he did not know or have any relationship with Richard
 9 Smith,² that Kroeker assured him that Smith had done and was doing work for the company, and
 10 that it was not until Kroeker revealed that she had arranged a post-issuance sale of the S-8 stock
 11 that Furusho realized the stock was being used for an improper purpose. If plaintiffs are able to
 12 establish these facts at trial, a reasonable jury could find that defendant Kroeker wilfully and
 13 intentionally breached her duty of care by initiating an improper securities transfer to Richard
 14 Smith in violation of federal law.³ The Court cannot resolve the obvious credibility issues raised
 15 by the conflicting declarations in the context of this motion for summary judgment.

16 Plaintiffs have not, however, come forward with evidence sufficient to raise a
 17 genuine issue of fact regarding their breach of loyalty and conversion claims. Although plaintiff
 18 Furusho states that defendant Kroeker admitted having sold S-8 stock during the relevant period
 19 (Decl. of Tolan Furusho at ¶ 16 (Dkt. # 96)), the evidence in the record refutes this testimony.

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21 ² Plaintiffs have not provided a declaration from Beverlee Claydon. Statements regarding what
 22 Claydon thought, knew, or was told have not been considered in ruling on this motion for summary
 23 judgment.

24 ³ In his declaration, plaintiff Furusho states that Nicholas Markovino provided *bona fide* services
 25 in consideration for the 500,000 common shares he received under Form S-8. Decl. of Tolan Furusho at
 26 ¶ 14 (Dkt. # 96). Having acknowledged the propriety of issuing those shares to Markovino, plaintiffs
 27 cannot establish a breach of the duty of care arising out of this transfer. Nor have plaintiffs made any
 28 attempt to show that Kroeker requested, initiated, or was otherwise involved in the issuance of S-8 stock
 to the other recipients identified in the transfer records of May 12, 2004, such as Richard Granieri,
 Robert Christian, Daniel Prins, Nick Fast, Yan Skwara, or Hank Vanderkam.

1 The transactional records of the company and its transfer agent contain no indication that there
2 were any transfers of Goldtech Mining Corporation stock to or from Tracy Kroeker between
3 May 12, 2004 (the date the S-8 stock issued) and October 14, 2004 (the date this action was
4 filed). Decl. of Ralph Jordan at Ex. A (Dkt. # 81); Decl. of Thomas E. Puzzo at Ex. D (Dkt.
5 # 95). Even if one considers the subsequent transfers of S-8 stock from Richard Smith, Nicholas
6 Markovino, *etc.*, to third parties, plaintiffs have failed to provide any evidence that these
7 individuals were acting as Kroeker's agents while engaged in these transactions or that the
8 transactions enriched defendant Kroeker, constituted a conversion of company property for
9 which Kroeker could be held liable, or otherwise breached Kroeker's duty of loyalty. Although
10 plaintiffs' breach of the duty of care claim against Kroeker may proceed regarding the issuance
11 of S-8 shares to Robert Smith, Kroeker is entitled to summary judgment on plaintiffs' conversion
12 and breach of duty of loyalty claims in their entirety.

13 (4) Although plaintiffs state in their opposition that “[d]efendant Jordan knew and
14 approved of the issuance of the S-8 Shares” (Opposition at 7), the evidence does not support
15 such a contention. In his declaration, Furusho states that Jordan became aware of the S-8 share
16 issuance only after Furusho brought it to his attention in August or September 2004. Decl. of
17 Tolan Furusho at ¶ 21 (Dkt. # 96). Jordan has also stated that he first discovered problems with
18 the distribution of the S-8 shares in August 2004 when he reviewed the draft second quarter
19 Form 10-Q that Beverlee Claydon sent him. Decl. of Ralph Jordan at ¶¶ 11-12 (Dkt. # 81);
20 Supplemental Decl. of Ralph Jordan at ¶ 8 (Dkt. # 100). In an attempt to show that Jordan was
21 aware of the S-8 share issuance, plaintiffs offer a partially legible document with what appears
22 to be five signature blocks, a fax header, and the word “Thanks!” written at the bottom. One of
23 the signature blocks has Tracy Kroeker's name typed on the signature line and one of the blocks
24 bears Ralph Jordan's signature. Goldtech's outside securities counsel, Hank Vanderkam, was
25 asked about this document during his deposition and could say only that the signature was Ralph
26 Jordan's, that the document is a signature page for an S-8 issuance, and that it was found in

1 Vanderkam's files. The document is not attached to a Form S-8, there is no evidence that it was
2 ever attached to a Form S-8 (the fax header identifies the document as "P.01"), there is no
3 evidence that this document or any Form S-8 signed by Jordan was filed with the SEC in May
4 2004, and Jordan has stated that he did not know that this signature block related to the issuance
5 of the S-8 shares. Supplemental Decl. of Ralph Jordan at ¶ 9 (Dkt. # 100). In light of plaintiff
6 Furusho's admission that Jordan was unaware of the S-8 issuance until August or September
7 2004, this incomplete and ambiguous document does not give rise to a reasonable inference of
8 prior knowledge on Jordan's part.

9 Plaintiffs also point to the fact that one of the proposed recipients of the S-8
10 shares, Daniel Prins, works for Jordan. Based on nothing more than the existence of this
11 employee/employer relationship, plaintiffs argue that Jordan initiated the transfer of S-8 shares
12 to Prins in order to benefit from a further conveyance of those shares, or a portion thereof, to
13 Jordan. As discussed above, there is no evidence that Jordan initiated, knew of, or was involved
14 in the May 12, 2004, issuance of S-8 shares and the fact that one of the proposed recipients
15 worked for him does not give rise to an inference of such involvement. In addition, there is no
16 evidence that Prins entered into a consulting agreement with Goldtech (sham or otherwise), that
17 he ever took possession of the S-8 shares issued in his name, or that he transferred those shares
18 to any person or entity other than Goldtech. Decl. of Ralph Jordan at Ex. A (Dkt. # 81); Decl. of
19 Thomas E. Puzzo at Ex. D (Dkt. # 95). Plaintiffs' allegations against defendant Jordan are based
20 on innocuous facts or ambiguous documents coupled with rank speculation and conjecture.
21 Having failed to produce any evidence from which a factfinder could reasonably conclude that
22 Jordan breached his duty of care, breached his duty of loyalty, or converted company property
23 for his own use, these three claims against Jordan must be dismissed.

24 (5) Without specifying any details regarding their conduct or state of mind,
25 plaintiffs allege that defendants Laskin and Egan breached their duties to the company by
26 orchestrating the transfer of S-8 shares to Prins with the intent that such shares, or a portion

1 thereof, would be further conveyed to them for their own personal benefit. No evidence is
2 offered in support of these accusations. In light of Laskin and Egan's statements that they were
3 unaware of the consulting agreements or the issuance of the S-8 shares until informed by Jordan
4 in August or September 2004, plaintiffs' unsupported speculation does not give rise to a material
5 issue of fact.

6 (6) Plaintiffs allege that defendants Jordan, Laskin, and Egan breached their duty
7 of care by failing to investigate and/or repudiate the issuance of the S-8 shares when Furusho
8 brought the matter to their attention in August and/or September 2004. Plaintiffs ignore the fact
9 that all three defendants signed written protests challenging the procedures by which the S-8
10 shares were authorized. In addition, Jordan, as Chief Executive Officer of the company,
11 initiated an investigation of the consulting agreements, the S-8 shares, and Furusho's allegations
12 against Kroeker. As of September 17, 2004, Jordan concluded that, contrary to Furusho's
13 primary contentions, Kroeker had neither received S-8 shares nor improperly transferred them to
14 third parties. Jordan also took steps to recall and recover the questionable shares during this
15 period. Jordan shared his report and/or conclusions with Laskin and Egan, who relied on his
16 investigative work and agreed with his recommendation to remove Furusho from his position as
17 an officer of the company. Such deference is neither unreasonable nor unlawful: Jordan was
18 active in the day-to-day operations of the company and Furusho has not identified any rule of
19 law or corporate management that would require each and every director to independently
20 investigate allegations of wrongdoing in order to discharge their duty of care to the company.
21 The fact that Furusho disagrees with the conclusions reached and actions taken by Jordan,
22 Laskin, and Egan does not indicate that the directors were uninformed or failed to investigate his
23 allegations.

24 (7) Plaintiffs may not rely on hearsay to support their claims. As noted in footnote
25 2, statements regarding what Beverlee Claydon thought, knew, or was told have not been
26 considered in ruling on this motion for summary judgment. The letter from Nicholas Markovino
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1 regarding the disposition of his 500,000 S-8 shares is also an out-of-court statement offered for
2 the truth of the matters asserted that has not been considered.

3 Plaintiff Furusho's statement that "all of the 500,000 shares of common S8 [sic]
4 stock issued to Richard Smith and the remaining 450,000 shares of common S8 [sic] stock
5 issued to Nick Markavino [sic] were delivered to and received by Tracy Kroeker via FedEx" has
6 been considered in light of the transactional records, interrogatory responses, and the limited
7 foundation set forth in the record. For purposes of this motion, the Court has assumed that, at
8 some point after May 12, 2004, both Furusho and Kroeker held in their possession some of the
9 actual stock certificates associated with the S-8 shares. The Court has concluded, however, that
10 in the absence of any evidence that ownership or actual control over their disposition of the
11 shares was transferred with the physical stock certificates, temporary custody over the
12 certificates does not give rise to a genuine issue of material fact regarding any of plaintiffs'
13 claims.

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15 For all of the foregoing reasons, defendants' motion for summary judgment
16 regarding plaintiffs' original three claims as restated in the First Amended Verified
17 Stockholders' Derivative Complaint is GRANTED in part and DENIED in part. The breach of
18 duty of care, breach of duty of loyalty, and conversion claims against defendants Jordan, Laskin,
19 and Egan are hereby DISMISSED. The breach of duty of care claim against defendant Kroeker
20 may proceed regarding the issuance of S-8 shares to Robert Smith: plaintiffs have raised a
21 genuine issue of fact regarding who initiated and controlled the issuance of the S-8 shares to
22 Smith in May 2004. Kroeker is entitled to summary judgment on plaintiffs' breach of duty of
23 loyalty and conversion claims, however, as well as the breach of duty of care claim to the extent
24 it relies on the issuance of shares to persons or entities other than Smith.

1 DATED this 19th day of December, 2005.
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Robert S. Lasnik
United States District Judge

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